

No. 2974

IN THE

United States Circuit Court of Appeals 5

For the Ninth Circuit

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AMERICAN TRADING COMPANY (PACIFIC  
COAST) (a corporation),

*Plaintiff in Error,*

VS.

NORTH ALASKA SALMON COMPANY  
(a corporation),

*Defendant in Error.*

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REPLY OF DEFENDANT IN ERROR TO  
PETITION FOR A REHEARING ON BEHALF OF  
PLAINTIFF IN ERROR.

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OTTO IRVING WISE,  
*Attorney for Defendant in Error.*

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## REPLY OF DEFENDANT IN ERROR TO PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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Pursuant to permission granted, this answer is filed, though the time allotted for the preparation thereof is so limited that we cannot answer at length the contentions urged by plaintiff in error in its petition for rehearing. There is nothing in the petition which has not already been fully treated in the briefs heretofore filed in this matter, and we respectfully direct the court's attention to our brief filed prior to the submission of the cause, as well as the opinion of the court itself.

While plaintiff in error has stated its cause of action is not one for rescission, nor for damages, nor for an indemnity against loss, we find no statement anywhere in the petition for rehearing in which the court is advised upon what theory it bases its right to recovery.

We assume that it is the theory of plaintiff in error that the delivery by defendant in error of salmon which did not comply with the requirements of the Pure Food Law caused a failure of consideration which entitles it to a return of the purchase price paid for the salmon. If this assumption is correct, it was the duty of plaintiff in error to rescind the contract on the ground of failure of consideration and to make restoration of any moneys received by it on account of the sale of the salmon.

Under Section 1689 of the Civil Code of California

“a party to a contract may rescind the same in the following cases only \* \* \*

3. If the consideration becomes entirely void from any cause.”

As to the manner of rescission, Section 1691 provides:

“He must restore to the other party everything of value which he has received from him under the contract or may offer to restore the same upon condition that such party shall do likewise.”

If the amount received had been a trifling sum, it might be argued that the failure of plaintiff in

error to return such sum would not preclude it from recovering in this action, but the undisputed testimony shows that it received at least \$2590 from the sale of the salmon. Certainly no court of equity will permit it to retain the benefit of the contract and at the same time recover the entire purchase price on the theory that the commodity delivered to it was absolutely worthless.

Two contentions of defendant in error raised on this appeal have been entirely disregarded in the petition for rehearing. Plaintiff in error has assumed in its brief that the contract for the salmon was rendered void by the delivery of salmon which did not comply with the requirements of the Pure Food Law. No attempt is made to answer the cases cited by us and particularly that of *Fox v. Rogers*, 171 Mass. 546, in which a contract, valid in its inception, was held not to be rendered void by any illegality in performance.

Furthermore, in its petition, plaintiff in error omits any reference to the contract itself, which provides that no claim for reclamation shall be made after delivery. This matter was fully treated in our previous brief and we feel it unnecessary to repeat the argument there contained, but we respectfully submit that this clause of the contract precludes any recovery in the action at bar.

Plaintiff in error asserts that the trial court erred in refusing to admit in evidence the judgment rolls in actions in which portions of the salmon were destroyed by order of the pure food authorities.



His present contention is that these records should have been accepted to show the condition of the salmon at the time it was shipped from Alaska. But clearly, evidence taken in another action in which defendant in error was not a party could not have been used against it in this proceeding.

The opinion of this court disposes of the position assumed by plaintiff in error previously on this appeal with reference to the judgment rolls.

We respectfully submit that all of the contentions now made by plaintiff in error were fully passed upon by the court in determining this case; that no error has been shown in the decision, and therefore the judgment of the District Court should be affirmed and the petition for rehearing denied.

Dated, San Francisco,

March 27, 1918

OTTO IRVING WISE,  
*Attorney for Defendant in Error.*